Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES HENDERSON,

Petitioner,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, petitioner objected in the district court to the approval of a class action settlement in which he is an absent class member upon whom the settlement purports to have binding effect. The district court approved the settlement. Thereafter, the Eighth Circuit dismissed petitioner's appeal of the district court's approval order for lack of jurisdiction, on the ground that petitioner was not an intervenor. On December 10, 2001, this Court granted certiorari in *Devlin v. Scardelletti*, No. 01-417, which presents the same issue presented in this petition: whether an absent class member must be an intervenor to have "standing" to appeal from approval of a class action settlement. The question presented is:

> Whether a class member, who upon receiving notice of a proposed class action settlement, files timely objections and moves to intervene, has standing to appeal the district court's approval of the settlement even though intervention is denied and he is therefore not an intervenor on appeal.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner James Henderson was an appellant below in the consolidated appeal. The respondents in this Court, appellees below, are: William P. Ludwig, Jeffery L. Sippil, Darrell D. Cunningham, John R. D'Alessandro, Bobby L. Chain, Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities, and General American Life Insurance Company.

Other persons named in the court of appeals' caption, but who are not respondents here, are: Lewis & Ellis, Inc., Karen Shapiro, Carl Kelly Paving, Inc., William Boje, Katherine Zoghby, Gloria Boje, Carol Singley Carroll, L. Henry Gissel, Jr., Preston Reeves, Dennis Lindsey, Ross J. Love, Jr., James L. Carroll, James N. Dickson, Howard Patterson, Charles E. Patterson, Pat's Auto Parts, Inc. Rahernat Amarshi, Amin Amarshi, Cynthia Stanley, Billy McNurlen, Patricia McNurlen, Mary Lewis, Gregory Harris, Jack Leinenweber, Roger E. White, Trustee, Oliver Kitchens Family Trust, David Garrett, William Gabriel, Sule Alli, Thomas Crovella, Larry Morris, Charles Hoskins, George Linsey, Oliver Kitchens, Tommy Rogers, Betty Rogers, George Moore, Jon French, and Dr. Lindsey Jones, Jr.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

James Henderson, the petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-titled case on October 16, 2001.

OPINIONS BELOW

Petitioner seeks to appeal a judgment approving a class action settlement. The district court's order denying petitioner's motion to intervene, approving the settlement, and entering a final judgment is unpublished. The October 16, 2001 opinion of the Eighth Circuit Court of Appeals (per Bye, J., joined by Bowman, J., and Morris Sheppard Arnold, J.), holding that petitioner's appeal was due to be dismissed because he did not challenge the denial of the motion to intervene on appeal and thus lacked standing, is reported at 268 F.3d 627 and is reprinted in the separate Appendix to this Petition. Pet. App. 1-17.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 28 U.S.C. § 1291, which provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * ."

STATEMENT OF THE CASE

It is undisputed that if objectors need not be intervenors to have appellate "standing" to appeal approval of a class action settlement, the Eighth Circuit would have reached the merits of petitioner's appeal rather than dismissing his appeal for lack of jurisdiction. That very question is now before the Court in *Devlin v. Scardelletti*, No. 01-417. Therefore, the Court should hold this petition pending the outcome in *Devlin*, and then dispose of the petition accordingly.

This petition arises from a class action lawsuit. Respondents are the named representatives of the class as well as the Defendant company. Respondents have agreed among themselves to settle the lawsuit.

Petitioner is a member of the Plaintiff class who sought to intervene in the suit to oppose the proposed settlement. Petitioner also filed timely objections to the settlement. The district court, however, denied the Petitioner's motion to intervene, rejected his objections, and approved the settlement.

The question presented is whether Petitioner may appeal the district court's approval of the settlement without appealing the denial of the motion to intervene.

The Eighth Circuit held that Petitioner did not have standing to appeal because he was not an intervenor (precisely the ruling currently before this Court in *Devlin*).

The suit underlying this petition involves three class actions filed against respondent GALIC, between February 5, 1996 and June 26, 1997. The three cases were consolidated by the Panel on Multidistrict Litigation in 1997 and transferred to the District Court for the Eastern District of Missouri for resolution of common pretrial proceedings. Petitioner is a member of the class of persons who purchased universal life insurance policies from GALIC between 1982 and 1996, and those who purchased whole life insurance policies from GALIC between 1984 and 1996.

Plaintiffs in the class actions generally alleged that GALIC had fraudulently manipulated dividend scales, interest rates, and related actuarial factors allowing it to misrepresent to its customers: the cash value and the benefits of the policies; the cost to the customer of canceling an existing policy and purchasing a new policy, otherwise known as "churning"; that after a certain number of years, no out-of-pocket premiums would be due from the customer, commonly known as a "vanishing" premium policy; and that the policy was actually an investment or retirement plan rather than a life insurance policy.

Respondents agreed among themselves to settle the class action cases and the district court certified a plaintiff class for purposes of the settlement agreement on August 28, 2000. The settlement agreement provides an

estimated value of $55 million in benefits to approximately 251,000 class members, or an average of $219.12 in benefits per class member. Under the settlement agreement, a class member could choose to take part in a Claim Evaluation Process ("CEP"), or if the class member chose not to participate in the CEP or made no choice, the class member would receive General Policy Relief. A class member was eligible to receive a cash award only under the CEP.

General Policy Relief ("GPR") provides automatic limited relief in the form of insurance benefits to class members who chose GPR and those who fail to make a choice. For class members with outstanding policies, GPR provides interest and mortality benefits on their existing policies. For class members who no longer have outstanding policies GPR provides relief in the form of a Contributed Insurance Benefit, which is similar to term life insurance.

Class members who elect to participate in the Claim Evaluation Process ("CEP") must submit a claim to a Claim Evaluator, who is chosen by respondent's class counsel. The claim includes a Claim Form, in which the class member details how he was misled by GALIC. Along with the Claim Form, the class member must submit documents supporting his claim, including statements of other persons who have knowledge of the circumstances surrounding the claim. In response to the class member's claim, GALIC submits documents, presumably to contradict the claim of the class member.

Once the Claim Evaluator receives the claim, he determines the merit of the claim and places it accordingly into one of four categories having a number score of zero to three. The amount of relief a class member will receive under this plan, varies from full relief with a score of three to no relief with a score of zero.

The Claim Evaluator is given objective criteria as to what score a particular claim deserves based on the evidence presented. However, the Claim Evaluator is given complete discretion to assign any score, that he thinks the claim otherwise deserves.

Under this settlement agreement, a class member may only receive full cash relief if the class member chooses to risk receiving little or no relief choosing to participate in the CEP. In addition to the disincentive the class member has to choose the CEP due to the risk of no relief, the class member is discouraged from pursuing cash relief because of the apparent time investment required to prepare a claim and the tremendous uncertainty as to the outcome of the CEP due to the amount of discretion given to the Claim Evaluator. Furthermore, the Claim Evaluator's decision is final in all respects and is not subject to any form of review.

Under the settlement agreement, a class member is led to accept limited relief under GPR rather than pursuing his claim under the CEP for what the class member rightfully believes he is owed. Under the agreement, choosing to avoid the risk of receiving no relief under the CEP while expending no effort in accepting GPR is the only logical decision for a class member to make.

Shortly after learning of the terms of the proposed settlement, petitioner filed timely objections and moved to intervene as a party pursuant to Fed. R. Civ. P. 24(a). Petitioner objected to the proposed settlement on two grounds: first, the existence of a zero score is unfair to class members and serves to discourage class members from pursuing their claims for full relief; and second, the settlement language unnecessarily gives the Claim Evaluator complete discretion in determining the score that a particular claim receives, further serving to discourage class members from pursuing their claims.

On December 19, 2000, the district court denied petitioner's motion to intervene and approved the settlement over his objections. The court did not believe "it is necessary for [it] to attempt to order renegotiation of the settlement agreement." Pet. App. 19. The court stated that the settlement agreement was "fine in its current form," and accordingly overruled petitioner's objections and ordered final approval of the agreement as negotiated. Pet. App. 19.

Petitioner appealed the district court's order to the United States Court of Appeals for the Eighth Circuit, and on October 16, 2001, that court dismissed petitioner's appeal for lack of jurisdiction because he had not become an intervenor in the district court.

The Court of Appeals relied on prior Seventh and Eighth Circuit precedent in holding that a class member who objects and tries to intervene does not have standing to appeal the merits of a settlement unless he has actually intervened. Pet. App. 9. The Court of Appeals interpreted this Court's three-paragraph per curiam opinion in

Marino v. Oritz, 484 U.S. 301 (1988), to support its holding. The court cited *Marino* for the proposition that, " '[a]bsent' class members – those who are not named representatives of the class – may not appeal from a settlement approved by a district court because they are not (strictly speaking) parties to the action." Pet. App. 8. *Marino*, however, involved an attempt to appeal a judgment by persons who were neither named parties *nor class members*, as is the case with petitioner.

The court, thus, implicitly rejected the view of Second and Third Circuits that *Marino* is properly distinguished from facts such as the ones in this case because *Marino* did not involve a class member who was objecting to a settlement. In dismissing petitioner's appeal, the court apparently disagreed with the Second, Third and Ninth Circuits which broadly permit non-named class members to appeal the merits of a class settlement when the class member objects and moves to intervene in the district court, even though the class member was not permitted to intervene. Again this is the similar issue that is now before the Court in *Devlin v. Scadelletti*, 01-417.

REASONS FOR GRANTING THE WRIT

There is no reason to repeat all the arguments from *Devlin* since they have already been taken by this Court. The Circuits are divided on this important question of Federal Law. In the instant case, the Eighth Circuit remained in line with the Fourth Circuit (*Scardellitti v. Debarr*, 265 F.3d 195 (CA4 2001), *cert. granted*, 122 S.Ct. 663 (Dec. 10, 2001), the Fifth Circuit (*Cook v. Powell Buick, Inc.*,

155 F.3d 758, 761 (CA5 1998)), the Sixth Circuit (*Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1061 (CA6 1994)), the Tenth Circuit (*Gottlieb v. Wiles*, 11 F.3d 1004, 1008-09 (CA10 1993)), and the Eleventh Circuit (*Guthrie v. Evans*, 815 F.2d 626, 628-29 (CA11 1987)), on the Federal question of whether intervention must be obtained by non-named class member who objects to a class action settlement in order to give that member standing to challenge an order approving such settlement. In direct contrast, the Second Circuit (*Kaplan v. Rand*, 192 F.3d 60, 67 (CA2 1999)), the Third Circuit (*Carlough v. Amchem Prods.*, 5 F.3d 707, 710 (CA3 1993)), and the Ninth Circuit (*Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (CA9 1977)) do not require such a procedural hurdle of a class member. The Seventh Circuit takes a more middle-of-the-road approach in that it requires that a motion to intervene be filed, but as a matter of course said motion should be granted by the district court in order to protect the objecting class member's right to appeal any such order finding a settlement to be fair, reasonable and adequate. *In Re Synthroid Mktg. Litig.*, 264 F.3d 712 (CA7 2001). Such conflict in the Circuits needs to be resolved. The Court has acknowledged the need for resolving this split by its grant of certiorari in *Devlin*. We ask only that this petition be held and then resolved in a manner consistent with *Devlin*.[1]

Furthermore, it is a denial of due process to invite absent class members to file objections to binding settlements and then to establish procedural obstacles that

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[1] If for some unusual reason the Court is ultimately unable to resolve the question presented in *Devlin*, then we ask that the Court grant this petition for plenary review.

preclude any appeal of the district court's finding approving the settlement. Once a settlement is approved, *res judicata* prevents an absent class member the right to further challenge the transaction which is the basis of the class action settlement. Class members' stake in such litigation may be so minimum that to opt out makes no sense; such class members should not be procedurally barred from filing an appeal. Otherwise, the class member is being denied his day in court.

CONCLUSION

The petition should be held pending this Court's decision of *Devlin* and then disposed of in a manner consistent with that decision; otherwise the Court should grant the petition for plenary review.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1264

In re: General American Life Insurance Company Sales Practices Litigation Lewis & Ellis, Inc., Karen Shapiro, Movants, James Henderson, Appellant, William P. Ludwig; Jeffrey L. Sippil; Darrell D. Cunningham; John R. D'Alessandro; Bobby L. Chain; Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities, Appellees, v. General American Life Insurance Company, Appellee.	Appeals from the United States District Court for the Eastern Distict of Missouri [TO BE PUBLISHED]

No. 00-1453

William P. Ludwig; Jeffrey L. Sippil; Darrell D. Cunningham; John R. D'Alessandro; Bobby L. Chain; Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities,

Plaintiffs,

Carl Kelly Paving, Inc.; William Boje; Katherine Zoghby; Gloria Boje; Carol Singley Carroll; L. Henry Gissel, Jr.; Preston Reeves; Dennis Linsey; Ross J. Love, Jr.; James L. Carroll; James N. Dickson; Howard Patterson; Charles E. Patterson; Pat's Auto Parts, Inc.; Rahernat Amarshi; Amin Amarshi; Cynthia Stanley; Billy McNurlen; Patricia McNurlen; Mary Lewis; Gregory Harris; Jack Leinenweber; Roger E. White, Trustee, Oliver Kitchens Family Trust; David Garrett; William Gabriel; Sule Alli; Thomas Crovella; Larry Morris; Charles Hoskins; George Linsey; Oliver Kitchens; Tommy Rogers; Betty Rogers;

George Moore; Jon French; Dr. Lindsey Jones, Jr.,

Appellees,

v.

General American Life Insurance Company,

Appellant.

Submitted: September 14, 2001
Filed: October 16, 2001
(Corrected 10/22/01)

Before BOWMAN, MORRIS SHEPPARD ARNOLD, and BYE, Circuit Judges.

BYE, Circuit Judge.

These consolidated appeals stem from a nationwide class action settlement between General American Life Insurance Company (GALIC) and more than 240,000 current and former policyholders. The policyholders claimed that GALIC committed fraud and made material misrepresentations in the course of selling certain life insurance policies. GALIC agreed to pay at least $55 million to class members in the form of additional policy benefits.

In appeal 01-1264, James Henderson challenges the district court's[1] conclusion that the settlement fairly rewards the class. We dismiss his appeal for lack of

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[1] The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

jurisdiction. In appeal 01-1453, GALIC appeals from the district court's order permitting several class members who tendered arguably defective opt-out requests to be excluded from the class. We affirm.

I

In May 1997, the Judicial Panel on Multidistrict Litigation consolidated three policyholder actions filed against GALIC in various federal district courts. The Panel transferred the consolidated cases to the Eastern District of Missouri to resolve common pretrial proceedings. The consolidated class of plaintiffs in the Eastern District of Missouri included those who purchased GALIC whole life insurance policies between 1984 and 1996, and those who bought GALIC universal life insurance policies between 1982 and 1996.

The class of plaintiffs pursued several claims against GALIC. The class alleged that GALIC sold "vanishing premium" policies by misrepresenting that a policyholder's premium payments would cease over time, when, in fact, additional premiums would be required. In addition, the class alleged that GALIC "churned" policies by persuading policyholders to remove the cash value or assets of their existing life insurance policies to acquire replacement policies. The class also alleged that GALIC misrepresented to policyholders that some of its policies were actually investments, not life insurance.

GALIC and class counsel negotiated a settlement and presented a Stipulated Agreement to the district court on August 24, 2000. The district court provisionally accepted the Agreement in an August 28, 2000 order. In that order,

the district court required GALIC to notify all known class members of the proposed settlement by mail and to publish notice of the settlement in 13 national and regional newspapers. GALIC was ordered to advise class members of their rights to opt out of the proposed settlement to pursue individual lawsuits. GALIC was also required to inform class members of a December 15, 2000 hearing at which the district court would entertain objections to the settlement and consider its overall fairness, *see* Fed.R.Civ.P. 23(d)(2), (e).

The district court established precise procedures for GALIC policyholders who desired to opt out of the class.

> Any Class Member who wishes to be excluded from the Class must send a written request for exclusion to the Clerk of the Court at the address provided in the Class Notice and Publication Notice. Any such exclusion request must be sent by first-class mail, postage prepaid, and must be postmarked no later than November 8, 2000 (*i.e.*, 35 days before the date of the Fairness Hearing . . .). Exclusion requests must specify the particular Policy or Policies the Class Member wishes to exclude from the Class. If the proposed settlement is approved, any Class Member who has not submitted a timely and properly written request for exclusion from the Class for a particular Policy shall be bound as to that Policy by all subsequent proceedings, orders and judgments in these Actions. . . .

Appellant's App. 267. Class members seeking to opt out of the class were required to write to a claims processing center in Minneapolis, Minnesota established during the class action. They were ordered to send signed letters and

to provide background information such as addresses, phone numbers, and GALIC policy numbers.

After the November 8, 2000 opt-out deadline passed, GALIC objected to numerous requests for exclusion that failed to comply with the district court's order.

- Twenty-nine class members (representing 47 GALIC policies) had filed opt-out letters that were received in Minneapolis on November 10, 2000, two days after the postmark cut-off date. Each envelope bore a postmark containing the month and year (November 2000), but none of these postmarks recorded a date, so it cannot be determined when these class members mailed their letters. Most of these letters were mailed by an Alabama law firm using its own postage meter, prompting GALIC to hypothesize that the law firm purposefully omitted the date on which the letters were mailed to obscure their tardy filing.

- Six other class members (representing 7 GALIC policies) neglected to sign their letters personally. One such class member hand-wrote her opt-out request and printed her name. In the case of the remaining five class members, an attorney prepared the members' opt-out requests and signed his own name.

- Finally, GALIC asserted that one class member failed *both* to postmark his opt-out letter with a particular date in November 2000 *and* to sign his letter. The class member's Pennsylvania lawyer submitted and signed his opt-out letter.

Class counsel urged the district court to deem the ostensibly tardy opt-out letters to be timely filed. Lawyers for the class proposed that letters received November 10 in Minneapolis must have been postmarked no later than November 8 in Alabama. Class counsel also argued that attorneys were entitled to sign opt-out letters on behalf of their clients. Though class counsel offered no explanation or excuse for class members' apparently defective filings, counsel urged the district court to permit class members to cure any defects by submitting corrected requests for exclusion from the class.

The district court acknowledged that the class members "failed to comply with all the technical requirements of the class notice for [opting out]." Appellant's Add. 3. Despite the evidence of non-compliance, however, the court evaluated the class members' violations and determined that the "interests of justice" required their exclusion from the class. As to the ostensibly tardy opt-out requests, the court found that "from the evidence before me, I believe they were timely mailed." *Id.* Over GALIC's objections, the district court permitted these class members to opt out of the class settlement.

The district court formally approved the parties' settlement in the same order that permitted class members to opt out of the class. Under the terms of the settlement, a class member could accept a lump sum payment (in policy benefits) or choose to pursue the possibility of greater relief through a claims-processing system operated by plaintiffs' lead counsel. Class members choosing the latter option would have their claims scored by qualified claims processors based upon the extent of their losses and proof of GALIC wrongdoing. The scoring

ranged from "three" (meriting the greatest relief) to "zero." GALIC describes a zero score as a sanction for rogue class members who present manifestly frivolous claims in cases where clear evidence demonstrates that GALIC acted properly. Zero scorers would not receive compensation from the settlement fund.

Henderson objected to the very existence of a zero score. He believed that the mere possibility – however remote – that a class member could receive no compensation was unfair. He moved to intervene in the district court and pressed this scoring objection as a reason for rejecting the proposed settlement struck by GALIC and class counsel. The district court overruled Henderson's objection and denied his motion to intervene in the action.

II

Henderson challenges the merits of the class settlement, but his challenge is quickly derailed by a jurisdictional impediment. Henderson neglected to establish party status in the district court, and he does not contest the district court's order denying him the status of a party on appeal. Because he is not a party, we dismiss his appeal for lack of jurisdiction.

"Absent" class members – those who are not named representatives of the class – may not appeal from a settlement approved by a district court because they are not (strictly speaking) parties to the action. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). An absent class member who objects to a settlement's fairness must first intervene in the district court, *see* Fed. R. Civ. P. 24,

and achieve the status of a party before challenging the settlement on appeal. *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992) ("We believe it is particularly appropriate to require intervention as a condition for appeal when a class member's challenge to the adequacy of a settlement is contrary to the view of all the other class members."). If the district court denies a class member's motion to intervene, the class member must successfully challenge the district court's denial of intervention on appeal to become a "party" entitled to contest the fairness of a class settlement. *Cf. B.H. v. Murphy*, 984 F.2d 196, 199-200 (7th Cir. 1993) (suggesting that an appellant who successfully challenges a district court's denial of intervention would be accorded party status).

Henderson is an absent class member, and so he is not a party entitled to appeal from the judgment entered by the district court. He moved to intervene in the district court in an effort to be recognized as a party, but the district court denied his motion as part of its omnibus December 2000 order. If Henderson contested the district court's denial of intervention, and we reversed, Henderson would be accorded party status, and he could then challenge the fairness of the class settlement.

In this instance, however, Henderson has not challenged the validity of the district court's order denying his motion to intervene. Henderson devotes the entirety of his brief to arguing the merits of the settlement, an issue we may not reach until we first decide that Henderson is a party (i.e., that he should have been permitted to intervene in the district court). Henderson neglects to identify the intervention question as an issue in his Statement of Issues, and he does not even mention the word

"intervene" in his brief. By failing to raise the intervention issue, Henderson has waived the issue and effectively conceded his non-party status. He is therefore ineligible to challenge the district court's determination that the class settlement is fair. *See Marino*, 484 U.S. at 304 ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.").

In a reply brief, Henderson asserts that he did challenge the denial of intervention by designating the district court's December 2000 order in his notice of appeal. This contention misses the mark. For starters, "[i]t is well established that issues not argued in an opening brief cannot be raised for the first time in a reply brief. . . . " *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881 (8th Cir.), *petition for cert. filed*, No. 01-521 (Sept. 24, 2001). Even if we consider the argument in Henderson's reply brief, however, we remain unpersuaded. Henderson confuses an appellant's obligation to preserve issues for appellate review by designating them in a notice of appeal, *see* Fed. R. App. P. 3(c), with the requirement that an appellant explain and develop those issues in his brief, *see* Fed. R. App. P. 28(a)(9). Designating a court order in a notice of appeal simply does not suffice to mount a challenge to a district court's decision when an appellant omits all mention of that issue in his brief. Henderson never bothers to explain how, or why, the district court erred in denying him the right to intervene. Yet he is required – at bare minimum – to provide such an explanation. *Cf. United States v. Wadlington*, 233 F.3d 1067, 1081 (8th Cir. 2000) ("We will consider only those contentions which include citations to the authorities and parts of the

record on which appellant relies.") (internal quotations and punctuation omitted), *petition for cert. filed*, No. 01-5228 (July 6, 2001).

In the absence of any argument that the district court improperly denied Henderson the opportunity to intervene in the class action, we conclude that he has waived the issue. He is not a party to the class action, and so he may not appeal the fairness of the settlement accepted by the district court. Accordingly, we dismiss Henderson's appeal.

III

In the second appeal, GALIC argues that the district court erred in permitting several class members to opt out of the class despite failing to follow various formalities specified by the court. We review the district court's decision for an abuse of discretion. *See In re Wirebound Boxes Antitrust Litig.*, 993 F.2d 152, 154 (8th Cir. 1993).

A

We first take up the question of the purportedly tardy opt-out requests filed by 29 class members. As a threshold matter, GALIC contends that these non-compliant class members were obliged to demonstrate "excusable neglect" for failing to comply with the district court's opt-out protocol, a showing these class members did not even attempt.

When a party fails to perform an act required by court order to be done within a specified time, he may convince a federal district court to overlook his untimely

act by demonstrating "excusable neglect." *See, e.g.*, Fed. R. Civ. P. 6(b), 60(b)(1). Many circuits have applied this standard to untimely opt-out requests, requiring class members to prove that their delay resulted from excusable neglect in order to perfect their exclusion from the class. *In re Paine Webber Ltd. P'ships Litig.*, 147 F.3d 132, 135 (2d Cir. 1998); *In re Copley Pharm., Inc.*, No. 96-8054, 1997 WL 767763, at *3 (10th Cir. Dec. 11, 1997); *Grilli v. Metro. Life Ins. Co., Inc.*, 78 F.3d 1533, 1538 (11th Cir. 1996) (per curiam); *Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994); *Williams v. Burlington Northern, Inc.*, 832 F.2d 100, 102 (7th Cir. 1987); *In re Nat'l Student Mktg. Litig.*, 530 F.2d 1012, 1014 (D.C. Cir. 1976); *see also Manual for Complex Litigation, Third* 231 (Fed. Judicial Ctr. 1995) ("The court may, in its discretion, treat as effective a tardy election to opt out. In exercising its discretion, the court should consider the reasons for the delay, whether there was excusable neglect, and whether prejudice resulted.").

We have not explicitly joined those circuits adopting an excusable neglect standard for tardy opt-out requests. But language in one of our earlier cases suggests that we would likely follow suit. *See In re Int'l House of Pancakes Franchise Litig.*, 536 F.2d 261, 263 & n.1 (8th Cir. 1976) (per curiam) (*IHOP*) (finding that a district court did not abuse its discretion in rejecting a class member's belated request to opt out of a class settlement because he failed to provide a reasonable explanation for his tardy filing and appeared to possess an improper motive for opting out after the court-ordered deadline). *IHOP* and the circuit decisions cited above suggest that we should be favorably inclined to GALIC's request that untimely opt-

out requests be judged against an excusable neglect standard. Though we would be inclined to adopt that standard at this juncture, we ultimately find it unnecessary to take that step in this appeal.

Everyone agrees that the excusable neglect standard applies only when a party commits an *untimely* act. Thus, we must first ascertain whether the class members' opt-out requests were timely before we decide whether to embark upon the excusable neglect analysis. GALIC's argument proceeds from the premise that the class members' opt-out requests were filed out of time, but we have reason to question this premise. The evidence of record suggests that the class members' opt-out requests were timely submitted.

We begin with the language of the district court's August 28 order. That order demands that class members desiring to exclude themselves from the class inform the Minneapolis claims processing center by letter postmarked not later than November 8. The order does not condition timely response upon *receipt* of the letter. Rather, the timeliness of an opt-out request is determined by the *postmark date* its envelope bears.

Each disputed opt-out request arrived with a dateless postmark. The postmarks reveal only that the letters were mailed in November 2000. We know that each disputed opt-out letter arrived in Minneapolis on November 10, but we do not know the precise date upon which the postmarks were affixed to their envelopes.

The district court resolved this dispute by finding that these opt-out requests were in fact timely mailed, i.e., that they were postmarked on or before November 8.

See Appellant's Add. 3 ("I believe they were timely mailed."). The court's expressed belief is akin to a finding of fact, which we would not disturb unless it were clearly erroneous. Given the highly deferential standard under which we review the district court's decisions concerning opt-out requests, *Wirebound Boxes*, 993 F.2d at 154 (abuse-of-discretion review), we must afford the court's determination fairly broad latitude in this case.

We are especially reluctant to disagree with the court's expression that the opt-out requests were timely mailed because it rests upon common sense and sound judgment. All but two of the disputed letters were mailed from Mobile, Alabama to the claims processing center in Minneapolis. The other letters originated in Jackson, Mississippi and Pittsburgh, Pennsylvania. It is reasonable to conclude that the time for delivery of regular mail between these cities exceeds one day. Indeed, it would be unreasonable, we think, to assume that the postal service delivers mail more quickly than this during snowy Minnesota winters. Even the Federal Rules of Civil Procedure presume a *three*-day mailing period by affording recipients of documents served by mail that additional period of time in which to respond. Fed. R. Civ. P. 6(e).

If mail delivery exceeded one day, then the disputed opt-out requests must have been timely postmarked (though the marks do not reflect it). The receipt of the disputed opt-out requests in Minneapolis on November 10 implies that the requests must have been postmarked and mailed no later than November 8 – the court-ordered deadline. We therefore accept the district court's determination that the disputed opt-out requests were in fact timely filed. Because we agree that the disputed opt-out

requests were timely, we need not engage in the excusable neglect analysis to which GALIC has invited our attention.

We hold that the district court properly permitted these policyholders to opt out of the class settlement.

B

Finally, we must consider the small group of class members whose opt-out requests GALIC challenges on the ground that they lack the members' signatures. Six of the seven class members who tendered unsigned opt-out requests had their attorneys prepare and sign their opt-out letters. Five of these six class members were represented by an Alabama attorney, Jubal Hamil. The sixth class member was represented by a Pennsylvania attorney, Vincent Longo. The remaining opt-out request was handwritten by an individual whose family-owned corporation held a GALIC life insurance policy.

GALIC points out that the court's order required class members to sign their opt-out requests, and notes that these class members did not do so. The district court agreed with GALIC that these seven class members failed to comply with the literal requirements of the court's order, which asked for a class member's signature, not an attorney's signature or a hand-printed name. GALIC urges us to hold that the district court abused its discretion by overlooking these class members' non-compliance. We decline to do so for two reasons.

First, we are not convinced that these class members violated the court's order. We acknowledge that the order

required class members to sign their own opt-out letters and these class members did not. However, these class members had their attorneys sign their opt-out letters in their stead. While an attorney's signature did not comply with the literal wording of the court's order, there is little question that the attorney's signature complied with the court order as a matter of law. Both in Alabama, *see* Ala. Code § 34-3-21, and in Pennsylvania, *Tucker v. Tucker*, 87 A.2d 650, 656 (Pa. 1952), attorneys are empowered to sign legal documents on behalf of their clients. Thus whatever the merit of GALIC's technical objection may be, the legal propriety of attorneys signing their clients' opt-out requests cannot be impugned.

Second, even if these class members violated the court's order by failing personally to sign their opt-out requests, we are persuaded that the district court acted within its sound discretion in overlooking the violations in the "interests of justice." *See, e.g., Council on Social Work Educ., Inc. v. Texas Instruments Inc.*, 105 F.R.D. 68, 71 (N.D. Tex. 1985) (collecting cases holding that " 'considerable flexibility' should be used in determining what constitutes an effective request for exclusion").

The class members' violations are in many ways analogous to a party's technical non-compliance with a local rule of court. It is well settled in our circuit that "the district court has considerable leeway in the application of its local rules." *Silberstein v. IRS*, 16 F.3d 858, 860 (8th Cir. 1994). "This court has previously stated that it is for the district court to determine what departures from its local rules of practice may be overlooked." *Trundle v. Bowen*, 830 F.2d 807, 809 (8th Cir. 1987) (citing *Braxton v. Bi-State Dev. Agency*, 728 F.2d 1105, 1107 (8th Cir. 1984));

see Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 611 n.2 (8th Cir. 1994); *United States v. Ford 250 Pickup*, 980 F.2d 1242, 1245 (8th Cir. 1992). We have also held that a district court may, in its discretion, elect not to sanction a party who does not comply with a discovery order. *Hazen v. Pasley*, 768 F.2d 226, 229 (8th Cir. 1985); *cf. Dela Rosa v. Scottsdale Mem'l Health Sys., Inc.*, 136 F.3d 1241, 1243 (9th Cir. 1998) (order) (declining to impose sanctions on attorneys who failed to comply with circuit rules). Our cases plainly suggest that a district court may disregard certain hyper-technical violations of its orders. In the circumstances presented in this case, we do not believe the district court abused its discretion by permitting class members to exclude themselves from the class settlement despite failing to sign their opt-out letters in their own names.

IV

We dismiss James Henderson's appeal, and we affirm the decision of the district court permitting several class members to opt out of the class settlement.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re GENERAL AMERICAN LIFE INSURANCE COMPANY SALES PRACTICES LITIGATION	No. 4:97MD1179 CDP (THIS DOCUMENT RELATES TO *Ludwig v. General American Life Ins. Co.*, No. 4:97CV1820 CDP; *Chain v. General American Life Ins. Co.*, No. 4:97CV1244 CDP; and *Zimmon v. General American Life Ins. Co.*, No. 4:97CV169 CDP)

MEMORANDUM AND ORDER

(Filed Dec. 19, 2000)

On December 15, 2000, I held a hearing to consider the fairness, reasonableness and adequacy of the settlement agreed to in these class-action cases. My Hearing Order dated August 28, 2000, preliminarily approved the class for purposes of settlement and directed that notice of the proposed settlement be sent to the class members. At the December 15 hearing, lead counsel for the plaintiff class appeared, as did counsel for defendant. Also attending were two counsel representing class members who have objected to the settlement, and one objecting class member appearing on his own behalf. I have also considered the written objections filed by several other class members. The parties made arguments and presented extensive written materials, including various declarations and exhibits.

For the reasons that follow, I will approve the settlement agreement. I begin this order by briefly summarizing a few of the arguments and issues presented at the hearing, and then will make my findings and conclusions. I have not attempted to discuss all the issues, and to the extent I have not done so, it is because I agree with the positions taken by lead counsel and defendant in their submissions.

The objectors argue that the class notice was not sufficient, that the settlement is underfunded and not adequate to protect the interests of all the members of the class, that administration of the settlement allows too much discretion on the part of plaintiffs' selected Claims Evaluator, and that the settlement is unfair because it contains the possibility that person whose claims lack any merit at all would not receive any relief at all. The objectors invite me to either rewrite the settlement agreement, or to give "conditional" approval. "Conditional" approval, as they describe it, would mean my suggesting that I approve most of the agreement, but disapprove specific provisions, and my suggestion that I would approve the agreement if those specific provisions were changed as the objectors request. The objectors expect, of course, that this sort of "conditional" approval would then cause the parties to rewrite the settlement in the way the objectors want. I do not agree that it is necessary for me to attempt to order renegotiation of the settlement agreement. I believe that the settlement is fine in its current form, and I will overrule the objections and approve the agreement as negotiated between lead counsel and defendant, and as set forth in the class notice.

The settlement agreement in this case provides a means whereby electing class members can receive cash payments to remedy their claims; class members who have not chosen to elect that remedy will receive in-kind relief. The settlement has a minimum value of $55 million, and an actual value which appears to be significantly higher. Plaintiffs' counsel will select the agent who will evaluate the individual class members' claims and determine the individual relief, so there is no reason to fear that defendant could somehow manipulate the relief to reduce the value of the settlement. Additionally, any attorneys fees awarded will be paid by the defendant in addition to the settlement value, so no class members' claims will be reduced for payment of attorneys fees. In short, I believe that this is a very good settlement for all concerned, and I will approve it.

Lead counsel and defendant have a dispute regarding 54 persons who sought to opt out of the class but failed to comply with all the technical requirements of the class notice for doing so. I have carefully reviewed the issue raised, and believe that plaintiffs are correct in stating that I should accept these opt-outs, despite their technical non-compliance. In the vast majority of the cases, the problem is simply that the notices were received a day or two late, although from the evidence before me, I believe they were timely mailed. Several others were signed by counsel instead of by the individuals. I believe it is in the interests of justice to accept these opt-outs, and so these persons will not be bound by the determination of the class action.

At the hearing we had some discussion regarding whether objectors should now be allowed to opt out of

the class, since I have overruled their objections. I will not allow this, as I do not believe it is in the interests of justice. Only one objector made an argument that it lacked sufficient information to determine whether to opt out, but that objector did make an appropriate election that should adequately protect its interests. This objector did not request that it be allowed to opt out at this late date, and I see no reason to allow either an opt out or a change of election after the deadline set in the class notice.

Defendant requests that the pleadings in these cases be deemed amended to conform to the proof adduced at the fairness hearing, so that the class definition can be deemed to be that set out in the settlement agreement, Hearing Order, and Class Notice. This is a reasonable request, and the pleadings will be deemed so amended.

Based on the evidence submitted to me and on the law, I make the following findings and conclusions.

1. This Court has subject matter jurisdiction over all claims of all Class Members asserted in the Action, subject matter jurisdiction to approve the Settlement Agreement, and personal jurisdiction over all parties to the Action, including all members of the Class.

2. This order applies to *Ludwig v. General American Life Ins.*, No. 4:97CV1820 CDP, *Chain v. General American Life Ins.*, No. 4:97CV1244 CDP, and *Zimmon v. General American Life Ins.*, No. 97CV169 CDP.

3. The best notice practicable under the circumstances was provided to members of the Class and full opportunity was offered to the Class to participate in the

Fairness Hearing. Notice in accordance with the Hearing Order was sent to over 251,000 class members, and was published in 13 newspapers. The parties established an Information Center telephone bank which answered calls from almost 14,000 class members and almost 400 insurance agents. Plaintiffs' counsel participated in the Information Center and through that center spoke to almost 3,000 class members. These results show that the notice in this case was the best practicable under the circumstances, and class members had full opportunity to participate or make their views known.

4. The requirements for class certification under Rule 23, Fed. R. Civ. P., and all other controlling law have been met:

a. **Numerosity**: The Class consists of approximately 250,000 persons or entities who (with certain exceptions described below) have or had an ownership interest in one or more permanent participating ordinary life insurance policies (participating whole life and/or participating universal life insurance policies), including any rider issued in conjunction therewith and/or endorsement attached thereto, issued or assumed by the Company in the United States (including its territories and commonwealths) during the Class Period by General American Life Insurance Company. For such universal life policies, the Class Period is from January 1, 1982 through December 31, 1996. For such whole life policies, the Class Period is from January 1, 1984 through December 31, 1996. The Class is ascertainable from the Company's records and other objective criteria, and the Class Members are so numerous that their joinder before the Court would be impracticable.

b. **Commonality**: Plaintiffs have alleged numerous questions of fact and law common to the Class, including whether defendant engaged in a nationwide common course of conduct regarding its sale of universal life and whole life policies involving (i) dividends, policy interest crediting and policy charge determinations; (ii) policy illustration practices; (iii) uniform sales practices relating to the sale of defendant's policies on the basis of the "vanishing premium" or "disappearing premium" concept; (iv) improper replacement or churning of existing policies into policies issued by General American; and (v) the sale of life insurance policies as "investment plans," "savings plans" and "retirement plans." Considering the allegations of the complaints, I find that these common questions of fact and law predominate over questions of fact and law affecting only individual members of the Class.

c. **Typicality and Adequacy of Class Representation**: Based on plaintiffs' allegations that defendant engaged in uniform conduct and made similar untrue or incomplete statements to members of the Class, I find that the claims of the representative plaintiffs are typical of the claims of the Class, and that the representative plaintiffs and their attorneys will fairly and adequately protect the interests of the Class, in that (i) the interests of the named plaintiffs and the nature of their alleged claims are consistent with those of all members of the Class, (ii) there appear to be no conflicts between or among the named plaintiffs and the Class Members, (iii) the named plaintiffs have been and appear to be capable of continuing to be active participants in both the prosecution and the settlement of the Actions, and (iv) the

named plaintiffs and the Class Members are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated class actions, particularly those involving the types of insurance sales practice claims alleged in the Actions.

5. I find that a resolution of the Actions in the manner proposed by the Settlement Agreement is superior to other available methods for a fair and efficient adjudication of the Actions. The settlement involves (a) General Policy Relief, which provides Class Members with opportunities to receive new death benefits free of charge, as well as payments or credits in the form of dividend interest benefits and dividend mortality benefits, and (b) a Claim Evaluation Process, which permits Class Members to obtain individualized forms of relief based on predetermined guidelines, which I have reviewed. I note that the Claim Evaluation Process offers an efficient, uniform means to identify and resolve complaints without burdening the courts or regulators. I also note that, because the Actions are being settled, rather than litigated, I need not consider manageability issues that might be presented by the trial of a nationwide class action involving the issues in this case. In making these findings, I have considered, among other factors, (a) the interests of Class Members in individually controlling the prosecution or defense of separate actions; (b) the impracticability or inefficiency of prosecuting or defending separate actions; (c) the extent and nature of any litigation concerning these claims already commenced; and (d) the desirability of concentrating the litigation of the claims in a particular forum.

6. **Class Certified**: Based on the foregoing findings, I certify the Class for settlement purposes only under Fed. R. Civ. P. 23(b)(3).

The Class consists of all persons and entities ("Class Members") who had, at any time during the Class Period, as set forth in paragraph 4(a) above, an ownership interest in one or more permanent participating ordinary life insurance policies (participating whole life insurance policies, and/or participating universal life insurance policies), including any rider issued in conjunction therewith and/or endorsement attached thereto, issued or assumed by the Company in the United States (including its territories and commonwealths) with an Issue Date during the Class Period (collectively, the "Policies"), except for the following:

a. policies issued on Form Nos. 10072, 81026, 81027, or 84WL in classes where the dividends are experience rated by payor;

b. policies issued on Form Nos. 40006, 10003, or policies with externally indexed crediting rates;

c. policies terminated prior to January 1, 1988;

d. variable policies which are issued pursuant to a registration statement filed with the United States Securities and Exchange Commission or pursuant to a private placement; or

e. certain corporate owned life insurance ("COLI").

The Class certified by this Court does **not** include (unless such persons or entities are Class Members by virtue of their ownership interest in other Policies):

i. any person or entity who, while represented by legal counsel, signed a document that releases General American from any claims concerning any Policy;

ii. any person or entity who has or had ownership of a Policy that is timely and properly excluded from the Class pursuant to Section VIII. of the Settlement Agreement;

iii. any person or entity who has or had ownership of a policy, where a death benefit was paid or is payable under the base coverage due to the death of all of the insureds before the Eligibility Date (as defined in the Settlement Agreement);

iv. any person or entity that has pending as of the date this Order is entered any lawsuit, arbitration or court-supervised alternative dispute resolution proceeding arising out of the same facts or transactions, in whole or in part, as alleged in the Actions;

v. any person or entity that has completed adjudication or a mutually agreed to arbitration or mediation of a claim against General American where the claim arises out of the same facts or circumstances, in whole or in part, that are the subject of the Actions;

vi. any insurance company that has or had ownership of a policy pursuant to an absolute assignment effected as part of an exchange under Section 1035 of the Internal Revenue Code;

any person who is a current or former director or officer of General American; or

vii. any person or entity that is not a resident of the United States as of the Notice Approval Date and has or had an ownership interest in a terminated policy.

The court finds that, for the sole purpose of settlement, and without an adjudication of the merits, the Class is sufficiently well-defined and cohesive.

7. **Findings Regarding Proposed Settlement:** I find that (a) the proposed settlement resulted from extensive arm's-length negotiations and was concluded only after counsel for plaintiffs had conducted adequate discovery (including review of approximately 90,000 pages of documents produced by defendant and 78 compact disks and floppy disks containing marketing and sales material, deposing General American officers and employees and consultation with independent experts about the issues raised by plaintiffs' claims), and only after counsel for General American conducted a thorough examination and evaluation of the relevant law, facts and allegations to assess the merits of plaintiffs' claims, including reviewing numerous documents produced by plaintiffs and their counsel and deposing all of the class representative plaintiffs; and (b) the proposed settlement evidenced by the Settlement Agreement is fair, reasonable, adequate, consistent and in compliance with all applicable legal requirements, and is in the best interest of the parties and the Class.

Accordingly,

IT IS HEREBY ORDERED that the parties' proposed settlement agreement, filed with this Court on August 24,

2000, and preliminarily approved by order dated August 28, 2000, is finally approved.

IT IS FURTHER ORDERED that all objections to the settlement are overruled.

IT IS FURTHER ORDERED that the motions to intervene of James Henderson and Karen Shapiro [#156, #157] are denied.

IT IS FURTHER ORDERED that all persons listed in Exhibit A as well as those listed in section 1 of Plaintiffs' and Defendant's Joint Submission of Requests for Exclusion filed with the Court on December 15, 2000, are deemed to have timely and properly elected to be excluded from the Class, and said persons will not be bound by the settlement in this case.

IT IS FURTHER ORDERED that the complaints are deemed amended to conform to the proof so that the class definition is that contained in this Order, the Settlement Agreement, the Hearing Order, and the Class notice.

IT IS FURTHER ORDERED that a hearing on plaintiffs' claims for attorneys fees will be held on Thursday, February 1, 2001, at 9:30 a.m., Thomas F. Eagleton Courthouse, 111 S. 10th Street, Courtroom 14 South.

A separate Judgment in accord with this order is entered this same date.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 19th day of December, 2000.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1264

In re: General American Life Insurance Company Sales Practices Litigation	
Lewis & Ellis, Inc.; Karen Shapiro, Movants, James Henderson, Appellant, William P. Ludwig; Jeffrey L. Sippil; Darrell D. Cunningham; John R. D'Alessandro; Bobby L. Chain; Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities, Appellees, v. General American Life Insurance Company, Appellee.	Appeals from the United States District Court for the Eastern District of Missouri (Filed Nov. 21, 2001)

No. 00-1453

William P. Ludwig; Jeffrey L. Sippil; Darrell D. Cunningham; John R. D'Alessandro; Bobby L. Chain; Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities,

Plaintiffs,

Carl Kelly Paving, Inc.; William Boje; Katherine Zoghby; Gloria Boje; Carol Singley Carroll; L. Henry Gissel, Jr.; Preston Reeves; Dennis Linsey; Ross J. Love, Jr.; James L. Carroll; James N. Dickson; Howard Patterson; Charles E. Patterson; Pat's Auto Parts, Inc.; Rahernat Amarshi; Amin Amarshi; Cynthia Stanley; Billy McNurlen; Patricia McNurlen; Mary Lewis; Gregory Harris; Jack Leinenweber; Roger E. White, Trustee, Oliver Kitchens Family Trust; David Garrett; William Gabriel; Sule Alli;

Thomas Crovella; Larry Morris; Charles Hoskins; George Linsey; Oliver Kitchens; Tommy Rogers; Betty Rogers; George Moore; Jon French; Dr. Lindsey Jones, Jr.,	* * * * * * * * * *
Appellees,	* * *
v.	* *
General American Life Insurance Company,	* * *
Appellant.	* *

JUDGMENT

These appeals from the United States District Court were submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in cause 01-1264 is dismissed for lack of jurisdiction and the judgment in the district court in cause 01-1453 is affirmed, in accordance with the opinion of this Court.

(5172-010199)

October 16, 2001

A true copy

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.